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# Supreme Court of the United States

OCTOBER TERM, 1947

No. 8

UNITED STATES OF AMERICA,
*Appellant,*

*v.*

LINE MATERIAL COMPANY *et al.*,
*Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

## JOINT REPLY OF APPELLEES TO APPELLANT'S SUPPLEMENTAL BRIEF ON REARGUMENT

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November 5, 1947.

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The only factual question of real importance in this case is this: were the license agreements involved entered into in good faith, the licensees desiring a license under the patents in order that they might make the patented devices, and the price limitation in the licenses originating with the patent owner and its desire to protect its own business in the patented devices, or was there a conspiracy among the appellees to bring about price fixing on dropout fuse cutouts through a licensing scheme?

After hearing all of the evidence, the Trial Court found:

> "The price limitation provisions contained in the various license agreements here in evidence were in-

> sisted upon by the patent owner and were intended and reasonably adapted to protect its own business and secure pecuniary reward for the patentee's monopoly. Each of the licenses granted to the licensee-defendants was taken and granted in good faith, the parties to the licenses believing a license under the patents to be necessary in order that the licensee could continue lawfully to manufacture and sell its dropout fuse cutouts. Apart from the written license agreements here in evidence, there was no agreement, express or implied, between the licensor and any licensee, or between any two or more licensees, with respect to the prices of licensed dropout fuse cutouts" (FF. 32, R. 514).

This finding is supported by the overwhelming weight of evidence.

The Government's Supplemental Brief seeks to persuade this Court that it should infer certain facts directly opposite to the findings of the District Court. The Government's contentions are based upon a highly selective presentation of the documents which ignores those facts which do not support its views and which is made with little regard for the chronology of events. This brief, so clearly reflecting the Government's lack of confidence in its challenge of the *General Electric*[1] doctrine, does not require a comparable reply. A detailed analysis of the documentary and oral evidence appears at pages 2 to 50 of our Main Brief. We there demonstrated that the evidence is more than sufficient to support the ultimate findings of the District Court.

There are, however, several specific points largely involving new matter which are raised for the first time by the Government in its Supplemental Brief and which require comment here.

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[1] *United States* v. *General Electric Company, et al.*, 272 U. S. 476 (1926).

**A. The oral evidence is entitled to great weight, and the Government's attempt to minimize and to discredit it is not well founded.**

In our Main Brief we have demonstrated that the evidence, both documentary and oral, supports the controlling findings of the District Court, and that indeed each of these two important categories of proof supplements and reinforces the other. The Government, in its Supplemental Brief, urges that this Court draw certain inferences from the documentary evidence, but it disregards the oral testimony, except where, taken out of context, it may be given the appearance of supporting one of the Government's arguments. We wish to point out at the outset the strength and scope of the oral testimony and to demonstrate the fallacious character of the Government's approach to the record. The documents, even when standing alone without the aid of oral testimony, defy the Government's ingenious efforts to spell out a conspiracy. When they are considered in conjunction with the sworn statements in open court of eleven witnesses, they conclusively refute the inferences which the Government attempts to draw. The oral testimony in this case is of such scope and importance that it should not and cannot be ignored.

The Government, conceding the great weight which must and should be accorded findings based on oral testimony, strives to obviate this difficulty by attempting to persuade this Court that this case is an exception. The technique employed is to minimize the scope and importance of the testimony and to create the impression that the testimony is in general so unreliable as to be entitled to no weight.

The Government cannot succeed in its desire thus to minimize and avoid the oral testimony. Eleven witnesses testified in this case. These were substantially all of the living actors who represented the licensor and the principal licensees in the transaction in issue. There is no question as to their familiarity with the subject matter of their testimony or as to their reputations for veracity and as men of good character. The scope of their testimony went to the entire subject matter of the case generally and extended specifically to substantially every major factual issue.

For the convenience of the Court we indicate below the witnesses who testified with respect to each of these issues, noting the pages in the record where substantial testimony appears. It will be noted that with respect to each of these issues, at least two witnesses testified, and there were sometimes as many as six or seven.

| Issue | Witness | Record Page |
|---|---|---|
| 1. Purpose of the cross-license | Kyle | 304–5 |
| | Lemmon | 124 |
| 2. No understandings of any nature other than the written cross-licenses. | Kyle | 305 |
| | Lemmon | 139 |
| 3. Independent policies of Line and Southern re price control—antedating the cross-licenses | Kyle | 304–5 |
| | Lemmon | 137–8 |
| 4. Infringement of Line and Southern's patents by the licensees | Kyle | 303 |
| | Bobst | 332 |
| | Crump | 413 |
| | | 418 |
| | Wilson | 433 |
| | Stratton | 449, 461–4 |
| | Cooley | 370 |
| 5. No agreements by licensees other than the written licenses— | | |
| (a) with respect to prices | Brown | 215 |
| | | 221 |
| | Kline | 280 |
| | Cooley | 392 |
| | Crump | 423 |
| | Stratton | 476 |

| Issue | Witness | Record Page |
|---|---|---|
| (b) with respect to taking licenses | Bobst | 336 |
| | | 353 |
| | Cooley | 378–9 |
| | | 398 |
| | Crump | 423 |
| | Carliale | 481 |
| (c) Line in fact established minimum prices independently and uniformly rejected any suggestions by individual licensees | Kline | 257 |
| | | 260–84 |
| | Kyle | 312–4 |
| | Bobst | 358 |
| | Cooley | 383–91 |
| | Stratton | 475–6 |
| | Carliale | 482–3 |
| | Wilson | 436 |
| (d) refusal of infringers to negotiate prior to the issuance of the patents | Bobst | 325 |
| | Crump | 419 |
| | Wilson | 429 |
| | Carliale | 479 |
| (e) efforts of the infringers to invalidate and avoid the patents and substantial failure to accomplish same | Bobst | 326–8 |
| | | 334–6 |
| | | 350 |
| | | 353 |
| | | 355–6 |
| | Cooley | 364–8 |
| | | 370–1 |
| | | 374 |
| | | 392–5 |
| | Wilson | 430–1 |
| | | 436–7 |
| | Stratton | 447–54 |
| | | 408–9 |
| | Lemmon | 132 |
| | Brown | 199–200 |
| | | 221 |
| | Kyle | 309–11 |
| | | 317 |
| | Carliale | 480–1 |

| Issue | Witness | Record Page |
|---|---|---|
| (f) efforts of infringers to limit the scope of the licenses and of price control | Brown | 193–4 |
| | | 199 |
| | | 221–3 |
| | Bobst | 330–1 |
| | | 342–3 |
| | | 348 |
| | Cooley | 370 |
| | | 377 |
| | | 402–3 |
| | Stratton | 468–9 |
| | | 473–4 |
| | Carlisle | 481 |
| | Wilson | 432–6 |
| (g) subsequent efforts of infringers to invent around the patents and to push other devices | Bobst | 353–8 |
| | Stratton | 454–5 |
| | | 465–6 |
| | Wilson | 436 |
| | Cooley | 393–5 |
| (h) nothing illegal or conspiratorial went on at meetings of the infringers | Cooley | 368 |
| | | 384–5 |
| | | 408 |
| | Bobst | 336–7 |
| | Carlisle | 481–2 |
| | Brown | 221–3 |
| | Kline | 228–30 |
| | | 247 |
| | Steinmayer | 360 |

The District Court saw and heard these witnesses, participated in their examination, and had ample opportunity, not only to observe their demeanor when testifying, but also to weigh their testimony in the light of the evidence as a whole. It is obvious from a reading of the Findings of Fact that the District Court believed these witnesses.

The Government's attempt to undermine the reliability of the oral testimony takes several forms.

First, it suggests that the testimony is without weight because it was elicited through leading questions from appellees' counsel (Govt. Supp. Brief, p. 147-8). The colloquy to which the Government refers occurred in the middle of the cross examination of the second of the eleven witnesses called in this case. The Trial Court admonished counsel not to ask leading questions of the witness, in spite of the fact that the witness had been called by the Government and was under cross examination. The stressing of this isolated incident, which occurred early in the trial, serves to illustrate the distortion to which the Government has resorted in its Supplemental Brief.

The Government also claims that the testimony was of such a generally unreliable nature as to warrant its being disregarded. The attempt is made to support this by reference to a number of specific instances in which the Government believes that six witnesses gave erroneous testimony on a relatively minor question of fact—the theory apparently being that a witness' entire testimony must be treated as worthless if it is proven wrong in any detail. The validity of that theory is doubtful, but in any event, analysis of the Government's claims quickly destroys the suggestion that these witnesses were guilty of untruths or that their recollections were faulty.

As to the witness Brown, the Government contends (Govt. Supp. Brief, p. 149) that his testimony (R. 213), to the effect that Kearney was at the time it signed its second license agreement subject to a license and price control, was shown to be false by the alleged fact that Kearney had "repudiated" its license. However, that Kearney was, legally and in fact, "subject" to a license is plainly not dis-

proved by the fact that Kearney had unilaterally objected to complying with some of its license obligations. The right which Kearney had under its license to cancel upon notice had never in fact been exercised; Kearney's license was not cancelled until it entered into its second license agreement (Ex. 143, R. 960),[1] as, indeed, the Government admits. Kearney was simply attempting to hold to the equivocal course of retaining a license to avoid being sued for infringement while evading its obligation under the license (Ex. 25, R. 670, 671; Ex. 38, R. 689, 690). Certainly, then, Brown was on firm ground when he testified that Kearney was "subject" to a license.

In attacking Brown's credibility, the Government also points (Govt. Supp. Brief, p. 149) to Brown's statement (R. 205) that Line in no way made acceptance of a license under the Lemmon-Schultz patents conditional upon acceptance of a license under Kyle. But, only a few pages later in the record Brown made it clear that he was speaking about only *open* dropouts, not *closed* dropouts (R. 212).[2]

Similarly, the testimony of Kline that he accepted and acted upon the advice of counsel to the effect that he could not lawfully control resale prices (R. 285), is not demonstrated to be incorrect by the evidence cited by the Government (Govt. Supp. Brief, pp. 149-50) showing that at a later period he had in one instance requested *information* with respect to a resale transaction (Ex. 420, R. 1592; Ex. 422, R. 1594; Ex. 485, R. 1665).

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[1]A table showing the record page where each of the exhibits cited herein was offered in evidence is set forth in the Appendix hereto, pages 44-45.

[2]We have shown in our Main Brief at pages 84-88 that there is no merit in the Government's contention that Line's actions with regard to the Kyle patent were improper. It suffices here to reemphasize that all of the cutouts involved in the Government's charge in this case are dropout cutouts covered by Line's Schultz

The testimony of Kyle that "we never knew *exactly*[1] who wanted price control" (R. 311), which the Government attacks, is obviously not contradicted by the evidence relating to Kearney referred to by the Government (Govt. Supp. Brief, p. 150), which shows merely that Kearney, one of the licensees, favored price control. Kyle knew that some had strong objections to price control and that others had no fundamental objections to it, and as to some he was simply in doubt.

As to the so-called "labored effort" (Govt. Supp. Brief, p. 150) of Carlisle (R. 482) to explain a clause in his memorandum, Exhibit 49, which stated that the licensees had made a decision to "get some price control", we have dealt with this fully in our Main Brief at page 52, where we show that, in point of fact, any other explanation was patently incredible in the light of the undisputed facts.

The portion of Crump's testimony referred to by the Government (Govt. Supp. Brief, p. 150), to the effect that there had never been any other agreement or understanding of any kind by Kearney with any of the licensees or licensor other than the written license agreement (R. 423), is not contradicted by the evidence cited by the Government, which shows merely that Kearney had refused to carry out its license obligations because of the failure of its and the

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patent, and the licenses under the Kyle patent add nothing whatsoever to the price limitations already imposed on such cutouts under the Schultz patent. The licensees were not required to use the Kyle patent and were free to use any other type of housing (as indeed, Westinghouse, for example, did) and were not required to pay royalties if they did not use the Kyle invention. The licensees who took a license under Kyle were admittedly infringing that patent, the validity of which is not contested by the Government.

[1]All italics herein are ours.

licensor's expectation that other licenses would be granted on similar terms (R. 415).

The Government's criticism (Govt. Supp. Brief, p. 151) of Cooley's testimony to the effect that no other manufacturer had agreed that if Matthews would take a license it would also do so (R. 379) is not supported by the fact that Railway had informed him of its intention to accept a license provided the other infringers did so. The other Cooley statement attacked by the Government (Govt. Supp. Brief, p. 151), is also explained in his own testimony at the same time, as the Government admits.

Moreover, it will be noted that no attack has been made by the Government on the testimony of the witnesses Bobst, Lemmon, Stratton, Wilson and Steinmayer. As will have been noted from the schedule above, one or more of these witnesses testified with respect to each of the major factual issues there described. Several of these witnesses testified on all major aspects of the case and had had a long familiarity with the transaction in issue.

From the outset the Government's case has rested upon inferences which it claims should be drawn from the documentary materials it selected. No direct documentary evidence establishing its contentions exists, and it presented no witnesses to substantiate its charges. The Government's selections from among conflicting inferences were shown by credible witnesses, as well as by the documents as a whole, to be wrong, and they must therefore be rejected.

Rule 52 of the Federal Rules of Civil Procedure provides that findings of fact by a trial court without a jury "shall not be set aside unless clearly erroneous" and requires that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

This Rule expressly recognizes the well-established position of this Court as to the weight to be given oral testimony in reviewing findings. That position was first stated in *Davis* v. *Schwartz*, 155 U. S. 631, 636: insofar as the finding of a judge who saw the witnesses "depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

Judge Hand, in the recent opinion in *United States* v. *Aluminum Company of America*, 148 F. (2d) 416, 433, speaking for the special three-judge statutory court, pointed with cogent reasoning to the significance of oral testimony in the light of the provisions of Rule 52 and to the practical importance of the rule of unassailability, as follows:

> "It is idle to try to define the meaning of the phrase, 'clearly erroneous'; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded. This is true to a considerable degree even when the judge has not seen the witnesses. His duty is to sift the evidence, to put it into logical sequence and to make the proper inferences from it; and in the case of a record of over 40,000 pages like that before us, it is physically impossible for an appellate court to function at all without ascribing some prima facie validity to his conclusions. Consumers Import Co. v. Kawasaki, 2 Cir., 133 F. 2d 781, 787. What the plaintiff is really asking is that we shall in effect reconsider the whole evidence de novo, as though it had come before us in the first instance. The impossibility of that at once appears, if we consider what it would have involved, had the appeal taken its usual course and been heard by the nine

justices of the Supreme Court. However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must be treated as unassailable'. Davis v. Schwartz, 155 U. S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289; Adamson v. Gilliland, 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356; Alabama Power Co. v. Ickes, 302 U. S. 464, 477, 58 S. Ct. 300, 82 L. Ed. 374. The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds. Morris Plan Industrial Bank v. Henderson, 2 Cir., 131 F. 2d 975, 977. Since an appellate court must have some affirmative reason to reverse anything done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases."

All of the crucial findings of the Trial Court in this case are consistent with the testimony of witnesses whose credibility it had opportunity to appraise. Not only can it not be fairly said that the witnesses "could not have been speaking the truth", but the testimony is in all its significant aspects consistent with and supported by the contemporaneous documentary evidence which is reviewed at length in our Main

Brief. The Findings of Fact, accordingly, must be treated as unassailable.

**B. The transactions, examined as a whole, negative the inferences which the Government continues to urge.**

The Government is contending that the isolated bits of evidence which it has culled from the exhibits lead to only one inference, namely, that appellees conspired to fix prices on dropout fuse cutouts. We have already shown that the Government is arguing from only a small portion of the evidence, paying little attention to much of the documentary evidence and no attention to the oral testimony which refutes the very inferences it seeks to have drawn from a few of the documents.

There are, moreover, certain findings, supported by facts established both through documents and testimony, which the Government either has expressly admitted or made no attempt to challenge. These facts in themselves refute the inferences which the Government seeks to draw. They demonstrate that the transactions underlying the relations between appellees came about for a lawful purpose and were merely natural and normal business transactions. These facts are summarized below:

1. Line and Southern were the lawful owners of admittedly valid product patents (FF 6-9, R. 502-3; Ex. L-22, R. 71).

2. When the patents issued, Line and Southern and all of the other appellees had for some time been manufacturing various cutout devices which fell within the claims of the patents and accordingly were manufacturing their respective devices illegally and in direct infringement of the patents (Govt. Proposed Amended Finding 15, R. 518; FF 10, R. 503-4; FF 15, R. 506).

3. Each infringer was confronted with the alternative of taking a license under patents or discontinuing manufacture (Govt. Proposed Amended Finding 15, R. 519; FF 15, R. 507).[1]

4. Line and Southern, as owners of complementary patents, cross licensed each other so that each would be in a position to continue manufacturing, and to facilitate the negotiation of licenses with infringers (FF 13, R. 505).

5. Line and Southern each had the inflexible intention to insist upon price limitations prior to any discussions or arrangements between them or with other appellees (FF 34, R. 514). They never departed from this position, which each had held for many years, and throughout Line persistently demanded that price limitation be accepted (FF 34, R. 514; FF 12, R. 504; FF 32, R. 514; Ex. GE-32, R. 1957; Ex. GE-39, R. 1974).

6. The licensees unsuccessfully sought to avoid taking a license by searching for evidence to invalidate the patents and by attempting to manufacture around the patent claims, and when they were unsuccessful in this they tried to minimize price control by insisting upon limiting the scope of the price clauses in the license (Govt. Proposed Amended Finding 15, R. 518-9; FF 15, R. 506; FF 21, R. 509; Govt. Proposed Amended Findings 21-4, R. 522-4).

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[1]The third alternative suggested by the Government (R. 519) of becoming subject to an infringement suit is, in the posture of this case, with infringement conceded and the validity of the patents not in issue, only another way of stating the second alternative.

7. Under the express provisions of the licenses all members of the industry were to be treated on equal terms and conditions, and a "most favored nation" clause was inserted in the licenses to prevent any licensee from being subject to discrimination.

8. The dropout fuse cutouts as to which the licensor controlled minimum prices under the licenses do not constitute the cutout industry or even the dropout cutout industry, the patented device being one of many similar competing devices performing the same function. As the District Court found, the patented cutouts constituted only 40.77% of the business done by the defendants in comparable devices (FF 5, R. 502).

The significance of these facts will be readily apparent. As owners of valid patents which were admittedly infringed, Line and Southern had the legal right to require the infringers to take licenses or to get out of business in the patented devices. Therefore, the licensees cannot be criticized for having eventually accepted licenses, nor can Line and Southern be criticized for enforcing their patents. As this Court and other courts have uniformly held, Line, as a manufacturer of the devices in question, was within its rights in insisting upon inserting price limitations in the licenses.[1]

At every turn the Government's briefs give the impression that any desire for price control involves moral turpitude and is abhorrent *per se*. But since it is lawful to control prices on original sales under patents, certainly there can be nothing wrong in desiring to do so.

The only question which remains is whether the price limitations of the licenses were the result of an illegal com-

[1]See the *Bement* and *General Electric* cases and the other cases cited in our Main Brief, at page 68.

bination or conspiracy between the licensees or whether price control was imposed by Line as licensor. The Court found that Line acted independently in demanding price control, and the admitted facts set out above strongly support this conclusion, for the evidence without qualification establishes that long prior to the issuance of these particular patents Line had firmly established the policy of placing price limitations in licenses under other patents, and that it decided to continue this policy in licensing the patents in question. Its chief officer testified that this decision was independently arrived at before any negotiations with anyone else, and there is no evidence to the contrary. All of Line's actions are consistent with this established fact. Moreover, it is perfectly obvious that no other position by Line would have made any sense from a business viewpoint. Confronted with competition such as that which some of the large licensees were in a position to create and were in fact creating, a small manufacturer such as Line naturally sought to protect its own business in the patented inventions which it had developed.

From a large volume of documents relating to the operation of the valid licenses, the Government contends that so-called price policing activities (Govt. Supp. Brief, p. 93 *et seq.*) and discussions concerning classification (Govt. Supp. Brief, p. 80 *et seq.*) demonstrate a conspiracy among appellees to fix and maintain prices.

Each of the licenses contained a "most favored nation" clause,[1] which, among other things, prevented Line from

[1]The Government's attempt to transform the request for such a customary clause into evidence of a conspiracy (Govt. Supp. Brief, pp. 18, 144-5) appears to be so far-fetched as to be frivolous.

designating minimum prices in one license in excess of minimum prices designated for any other licensee. While prices varied, the result of these provisions was to keep the same minimum price level for each variety of dropout fuse cutouts covered by the licenses. Each licensee naturally knew that competitors manufacturing dropouts were also licensed, and each licensee felt free to communicate with the licensor concerning the operation of the license agreement. The Government finds something sinister in the fact that Line undertook to perform its obligations under the licenses and dealt fairly with all licensees, but this was merely the fulfillment of its contractual obligations. If Licensee A was allowed under the terms of its license to sell below the minimum price required of Licensee B under the terms of its license, this constituted a violation of B's license with Line and B was entirely within its rights to bring the matter to Line's attention and ask for equal treatment. Similarly, if Line sold below the scheduled price the licensee was entitled to sell at the same price. It was, therefore, wholly natural for the licensees to communicate with Line where it appeared that a particular licensee was selling below the established minimum prices. This policing activity, so-called, was nothing more or less than the normal interest of each licensee in seeing that Line complied with the terms of its formal license.

The Findings and the evidence are in accord. The Court properly found that at times complaints were made to Line that certain licensees had not observed the minimum prices set by Line for the licensed devices and that Line wrote to the alleged license violator relative thereto, but that there was no joint action by way of policing or otherwise taken between the licensor and the licensees, and that there was

no agreement among the licensees, either with the licensor or among themselves, that they would assist in policing the industry (FF 31, R. 513-4).

The evidence cited by the Government (Govt. Supp. Brief, pp. 93-6) goes no further than proving that, as the Court found and as is conceded, complaints were made by individual licensees directly to Line. There is not a scintilla of evidence of agreement, or even communication, between licensees with respect to policing prices, nor of evidence that the complaints were made pursuant to agreement with or suggestion by Line. The witnesses testified that no such agreements existed and that no such suggestion was made (R. 214, 280, 388).

The practical and legal reason the complaints were made is obvious. As testified by Cooley, of Matthews (R. 381, 389), each licensee having no right under its license to sell below Line's prices on the patented devices, it was necessary for the protection of its business either that Line put an end to infringing competition or permit it to meet that competition. As each license contained a "most favored nation" clause, each licensee reasonably had the right to demand that it be put on a parity with its licensed competitors. That is all that any licensee did.

The Government contends (a) that Line agreed with its licensees to maintain its prices, (b) that the purpose of such agreement was to protect its licensees and (c) hence that such agreement was unlawful under the doctrine of the *General Electric* case, not being reasonably necessary to the protection of Line's rights under its patents (Govt. Supp. Brief, pp. 129-31). But the facts are to the contrary and support no such implication. The licenses, which constitute the only evidence cited by the Government in sup-

port of its charge that such an agreement existed, were subject to the limitation that the prices of patented devices should be no more favorable "than those established from time to time *and followed by the Licensor in its sales*" (*e.g.*, Ex. 94, at R. 822). In order to determine whether sales were within that limitation of its license, a licensee had to know what Line's prices were. That was accomplished by Line's furnishing a schedule of its current prices, but that schedule was subject to change by Line in its own discretion at any time upon ten days' notice. In order to assure the licensees that the schedule did accurately embody the prices "followed by Line in its sales", the licensees were given the right to inspect Line's books, which, incidentally, the record does not show was ever exercised. No manufacturer who intended in good faith to observe the terms of a license would accept a license limited to sales at prices followed by the licensor, a competitor, without assurance that it would be kept advised of changes, published or private, in the licensor's prices. If the licensor were free to change prices without notice to the licensee, the business of the licensee might be entirely lost and the license nullified. The provisions, designed to keep the licensee advised of the prices which Line was following and hence at which the licensee was licensed to sell, were, therefore, reasonable and necessary in order to induce manufacturers to accept licenses. There was no agreement by Line to maintain any prices; its only agreement was to be truthful with each licensee, to allow the licensee to determine whether Line was being honest in its representations as to its own prices and to give the licensee ten days' notice of proposed changes in Line's own prices.

The inherent reasonableness of this practical protection for the licensees was recognized, as the Government most reluctantly admits (Govt. Supp. Brief. pp. 155-6), in the

*General Electric* case, where the license agreement in fact went further and provided for liquidated damages to the licensee if the licensor held the licensee to prices which it itself did not maintain.

Essentially the same considerations are involved in connection with the subject of classification. Obviously the classification of the devices by Line had a close connection with the minimum prices established by it pursuant to the licenses. No licensee was free to undersell Line's price for a comparable patented device. Similarly, each licensee was entitled to as favorable treatment as any other licensee. Necessarily, therefore, the classifications had to be on a uniform basis. There was no room for unequal classification either as between Line and any given licensee or as among the various licensees.

The significant question with respect to the establishment of classifications by Line and the so-called classification meetings of September 1940 and January 1941, is whether prices and classifications were fixed by Line alone or were fixed in concert with the licensees. This subject has been fully discussed and documented in our Main Brief at pages 55 through 58. We there demonstrated that not only were prices not discussed at either of these meetings, but that the classifications were prepared by Line acting independently and without agreement by Line with the licensees or by the licensees with each other.

The September meeting lasted but a brief time because of the fact that Line was not then in possession of the data requested by it to prepare classifications. The classifications were prepared by Line subsequent to the September meeting and the individual classification for each of the licensees was sent to it and to it alone, so that no licensee had even the

chance of comparing his classification with the classifications of the other licensees. The proposed classification sent by Line to the various licensees became the final one, except insofar as Line had made purely inadvertent errors.

By the time of the January 23, 1941, meeting, the final classification had already gone into effect. That meeting was concerned primarily with requests for exemption in respect of existing sales commitments of the licensees, and the answering by Line of questions which particular licensees had with respect to the classification of their devices.

**C. The last minute effort of appellant to suggest that General Electric was the instigator and architect of the entire licensing plan is without foundation in fact.**

In its Supplemental Brief, the Government now appears substantially to rest its claim of conspiracy among the licensees on General Electric's activities and the relations of the other licensees with General Electric. The theory that General Electric was the master architect of an illegal price-fixing combination, is, on the record in this case, little short of fantastic, as may be seen from the following chronological review of General Electric's activities in connection with this matter. The Government's theory ignores completely the fact that the activities of General Electric, of which the Government complains, were engaged in *after* it had been made abundantly clear that substantial efforts to design around the patents had been unsuccessful, that the patents were valid and that the licensor was unalterably determined to insist upon price control.

The Trial Court found, with regard to General Electric, as follows:

"General Electric actively opposed and sought to eliminate all price limitation. It was unsuccessful in this, but it was successful in restricting price limitation to devices covered by the Lemmon and Schultz patents, instead of devices covered by the 11 issued patents and the 7 applications for patents under which Southern had first proposed to grant licenses. It sought unsuccessfully to eliminate price limitation on the so-called 'power fuse', and it secured a separate license under the Kyle patent without any price limitation. After taking a license, General Electric continued its efforts to design a satisfactory dropout which would not infringe the licensed patents, thus avoiding price control. It also put its greatest selling efforts into the promotion of the non-dropout fuse cutout, which was not subject to price control. General Electric's license was in no way conditioned upon the taking of a license by anyone else, and it had no agreement or assurance that anyone else would do so. It did not agree with anyone that it would take a license until it actually signed the license agreement, and it made no attempt at that time or later to get others to take licenses or to agree to do so. Furthermore, there was no agreement or understanding that General Electric's license agreement or any part thereof would not go into effect immediately upon its execution, and it became effective immediately when executed" (FF 21, R. 509-10).

The evidence, both oral and documentary, completely supports this Finding.

In 1938 General Electric was informed that Southern had been authorized to grant licenses under certain Line patents and applications, including the Schultz and Steinmayer application on the double jointed hinge dropout fuse cutout (Ex. 14, R. 638). General Electric had previously

made extensive but unsuccessful searches for prior art to invalidate the Line and Southern patent claims covering the double jointed hinge dropout and had tried, but failed, to design around the claims in order to avoid infringement (R. 321, 323; Exs. GE-2-3, R. 1914-20; Ex. GE-5, R. 1922). On June 22, 1938, Bobst of General Electric met with Lemmon to discuss the possibility of obtaining a license under the Line and Southern patents.

At this conference Lemmon insisted that any license would have to provide for price control by the patent owners, Southern fixing prices for cutouts which came under its patents and Line fixing prices for devices which came under Line's patents solely (Ex. 15, R. 640).

This insistence on price control was in accordance with the previous position of both Southern and Line, each of which had *independently insisted from the very beginning* that any license under its patents would have to have a price control clause (R. 126, 137, 304, 309, 311).

General Electric was opposed to the demand for price control. As Bobst testified,

> "My instructions were to get the agreement without price control, if possible * * * we didn't want anyone setting our prices for us" (R. 336-7).

Lemmon, when asked as to General Electric's "view as to the price control clause that you were requiring", stated emphatically, "They didn't like it" (R. 132).

Brown stated:

> "Mr. Bobst was quite provoked that we kept on insisting on price control. He said that his company did not want others controlling their prices" (R. 199).

Kyle stated:

> "I know one in particular, General Electric, fought tooth and nail never to have price control" (R. 311).

On October 7, 1938, Lemmon wrote General Electric (Ex. 20, R. 661) enclosing a proposed license agreement. This proposed agreement, which is the same as Exhibit 18 (R. 325), provided for a royalty of 5% and, in paragraph 11, provided for price control by Southern on all devices covered by any licensed patent belonging to Southern. It also provided that if any device made by the licensee was covered only by a patent belonging to Line and included in the license, then Line's prices should govern.

On March 16, 1939, Lemmon wrote General Electric (Ex. 31, R. 679), giving formal notice that the Lemmon Patent 2,150,102 had issued and insisting that General Electric must either cease infringement or take a license at once. Upon receipt of this notice, General Electric ordered a copy of the history of the Lemmon Patent from the Patent Office for study and made some additional searches for prior art, but did not find anything better than the unsatisfactory references previously found (R. 326). It then made a further attempt to find anticipating material by writing to its representatives in Germany, France and England, asking that searches be made in those countries (Exs. GE-6-8, R. 1923-8). The replies from these representatives (Exs. GE-9-16, R. 1929-43) showed that they did not discover any additional helpful prior art.

As a result of the failure of all of these efforts to discover material which would invalidate the patent, Bobst advised his engineering department

> "that we did not have a satisfactory reference for the claims of the Lemmon patent, and that eventually

> *we would either have to take a license under the patent or quit manufacturing, or get a construction which didn't infringe"* (R. 328).

In the meantime, Matthews of the Matthews Company, which had received a similar notice of infringement from Lemmon, telephoned General Electric on March 22, 1939 (R. 328; Ex. 34, R. 684) and suggested cooperation and exchange of information in trying to invalidate the Line and Southern dropout patents. Following this conversation Cooley of the Matthews Company wrote Bobst on March 25 (Ex. 34, R. 684), stating:

> "we will be pleased to cooperate with your company and other interested cutout manufacturers in an effort to find a basis for making this license agreement unnecessary. * * *
>
> "In considering this matter further, we have communicated with several of the other manufacturers who would naturally be interested in avoiding a license on these Cutouts".

In order to "find a basis for successful defense", he suggested it might be helpful to hold a conference. Bobst replied (Ex. GE-19, R. 1946), suggesting that the proposed conference

> "should be postponed until such time as the attorneys for the several companies have had an opportunity to complete their investigations of the patent so as to be in a position to exchange information".

The Government's Supplemental Brief states (p. 4) that "the uncontradicted documentary evidence in the record shows that General Electric first suggested concerted action vis-a-vis Line and Southern to the industry." Actually the uncontradicted evidence outlined above shows that it was

Matthews which first made such suggestion,[1] but, in any event, we fail to see how the Government derives any satisfaction from this suggestion. The concerted action was to invalidate patents and avoid price control. Certainly there can be nothing wrong in a manufacturer, who has been notified of patent infringement, conferring with others who have likewise been notified in order to exchange in-

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[1]Matthews, like General Electric, was, as the District Court found (Opinion, R. 497; FF 22, R. 510) "actively opposed to price control".

Not only did the witnesses testify that Matthews was opposed to price control and sought practical means to avoid its imposition, both before and after the execution of its license (R. 221-3, 317, 370-1, 377, 393-5, 403, 481), but, contrary to the Government's claim (Govt. Supp. Brief, p. 24), the contemporaneous documents bear eloquent witness to Matthew's attitude and, concretely, to the principal steps which Matthews took to avoid price control. These documents show, among other things, that Matthews was a prime mover in the attempt of the infringers to avoid the necessity of taking licenses and to avoid or limit price control (Exs. 32-4, R. 680-5; Ex. 40, R. 692; Ex. 57, R. 715; Ex. 71, R. 744; Ex. M-1, at R. 2026); that even after General Electric had taken a license, Matthews continued to take the lead in urging the infringers to delay and "not to rush into this thing" (Ex. 117, R. 878); that Matthews strenuously objected to price control under the Kyle patent and when defeated selected a form of license which would assist it in realizing its hope of shortly being able to operate without the license and thus avoid price control under Kyle (Ex. M-2, R. 2029, R. 3734). Exhibit 170 (R. 1033) quoted only in part by the Government (Govt. Supp. Brief, pp. 31-2), when read in its entirety corroborates the foregoing.

The evidence relied on by the Government, which is set forth wholly without regard to the chronology of events, proves only that when it appeared that price control was a *sine qua non* of securing a license, Matthews was determined not to allow itself to be placed at a disadvantage vis-a-vis its competitors. This same determination carried over into the period after licensing, when, as the evidence shows, Matthews closely watched the relations between Line and other licensees to make certain that Line fully complied with the "most favored nation" and other provisions of the Matthews license.

formation and develop facts for the purpose of invalidating the patent.

On May 26, 1939, Mr. Wagner wrote Mr. Goodwin of the General Electric Engineering Department advising him (Ex. GE-26, R. 1953) of the situation and that:

> *"It is the opinion of our Patent Department that we actually are infringing* * * *.
>
> * * *
>
> "It is probable that a meeting will be held before the middle of June with other manufacturers, *to see whether any one has anything that might be used to void this patent*, but Mr. Bobst is not optimistic about the results".

On May 29, 1939, Bobst wrote Traver of the high voltage cutout division of General Electric in Philadelphia that a meeting was set for June 1 in New York, to discuss the patent situation in connection with dropout fuse cutouts (Ex. GE-28, R. 1954). Traver replied on May 31 that "it appears that only people with plausible arguments against the validity of the Lemmon claims would give any constructive assistance. Since we have no such contribution from Philadelphia there appears to be no advantage in our attendance" (Ex. GE-31, R. 1956).

It is clear, therefore, that the purpose of this meeting, which was held on June 1, 1939, was to discuss the material which might invalidate the patent.

It was the consensus at the meeting that the defense material against the Lemmon and the Schultz and Steinmayer patents did not look very promising (Ex. 50, R. 705; R. 334-7). The license forms previously submitted to each of those present by Southern were considered and various objections discussed. One objection was that

Southern was named as licensor of the patents and insisted on setting the prices on all cutouts covered by the patents, although it did not make enclosed cutouts, and Line, not named as licensor, also insisted on controlling prices, if only its patents applied (Ex. 50, R. 705; R. 334-6).

The Government refers to this exchange of views as constituting an agreement "that a price fixing agreement for the entire industry would be traded out with Line and Southern." Actually the uncontradicted testimony of the witnesses shows that there was no such agreement and that General Electric Company, among others, had not reached any decision as to whether or not to take a license (R. 336). It is of course true that individual views were expressed at the meeting as to the probable desirability of taking a license in view of the strength of the patents and the consensus was that it would "probably be best to take licenses" on the basis of the information then available (Ex. 50, R. 705), but that exchange of views certainly falls far short of the agreement which the Government asks this Court to infer in the face of a finding below to the contrary. The evidence shows that the meeting of infringers was for the purpose of exchanging information to avoid taking any license whatsoever if this were possible, or, if a license turned out to be necessary, to exchange views as to how to secure the least onerous license possible. It was the patent owners who insisted upon price control, and price control was not the result of any agreement between those who eventually became licensees.

The Government's Supplemental Brief also states at page 6 that agreement was reached at this meeting "that no further serious efforts would be made to invalidate the basic Lemmon and Schultz patents". This same statement is repeated several times in the brief and becomes one of the

main bases for the Government's argument, but it is without any support whatever in the record and is contrary to the undisputed evidence which shows that, as the Trial Court found:

> "Nevertheless, for many months thereafter, General Electric, Matthews, Westinghouse and Schweitzer & Conrad continued to search without success for material invalidating the Lemmon and Schultz patents" (FF 15, R. 506; Exs. GE-51-4, R. 1990-7; Exs. W-13-5, R. 2302-10; Ex. M-9, R. 2042; R. 350, 367-8, 432).

Thus, for example, Exhibits GE-51-4 show a further investigation as to the validity of the Lemmon and Schultz patents by General Electric in November, 1939, and Exhibit W-15 shows a validity search by Westinghouse in February, 1940. This continued search for material invalidating the Lemmon and Schultz patents was even admitted in the Government's Proposed Amended Finding 15 (R. 519).

On June 6, 1939, as previously arranged at the request of Lemmon (Exs. GE-27-9, R. 1954-5), Bobst and Wagner had a conference with Lemmon and Kyle and their attorneys. In view of the objections which General Electric made to the license proposed by Southern and the desire of General Electric to secure clearance under Line patents, which Southern could not license, Line and Southern stated that the license might be drawn so as to make Line the licensor.

The Government's brief states that this action of General Electric in advising the patent owners as to changes it desired in the proposed license agreement, and that certain other infringers with whom it had discussed the matter also felt that such changes were desirable, constituted General

Electric "the representative of the industry to bargain collectively with the patentees" (Govt. Supp. Brief, p. 6). Collective bargaining implies some power in the representative to make an agreement for a group, but the evidence is undisputed that General Electric neither had nor sought any power to make an agreement for anyone but itself (R. 336, 398).

On June 21, 1939, Kyle wrote General Electric pressing for action in the matter (Ex. GE-34, R. 1967), and also on that date Bobst wrote to outside counsel for General Electric for an opinion in regard to the proposed licenses under the Lemmon, Schultz and Kyle patents (Ex. GE-32, R. 1957). In his letter he summarizes the situation with which General Electric was faced, stating:

> "We have been offered by Line Material Company of Milwaukee, Wisconsin a license under a group of patents relating to fuse cutouts. The general terms on which Line Material is willing to grant a license have been outlined to us. These terms include price control, *Line Material, in order to protect its business, being unwilling to grant a license without price control.*
>
> * * *
>
> "We have made an extensive search and have been unable to locate any references better than those which were cited by the Patent Office against the Lemmon patent. Also, our search indicates that *no reference exists for the claims which have been allowed in the Line Material application.*
>
> * * *
>
> "For some time past, our engineers have endeavored to devise something to get around the drop-out feature but up to the present time have been unable to do so."

The opinion of outside counsel to General Electric, dated July 20, 1939, stated (Ex. G-33, R. 1963):

> "In the present case you do not wish the price control, but you do need a license which you cannot afford to refuse in spite of the price control restrictions. Under these circumstances I feel you are justified in taking an appropriately drawn license".

On August 10, 1939, another meeting of the various infringing manufacturers was held in New York for a further discussion to see if any additional prior art had been located and to exchange views as to the objectionable features contained in the proposed patent license sent to each company by Southern. No one had been able to find any better prior art than the unsatisfactory material discussed at the previous meeting (R. 341).

Prior to the meeting, Bobst had redrafted the agreement originally submitted by Southern to General Electric, which redraft he intended to submit to Southern as the basis for further negotiation by General Electric to secure a license. In the Bobst draft (Ex. 57, R. 715), which he brought with him to the meeting for discussion, Line was made the licensor rather than Southern, price control was limited to devices covered by both of the two principal patents and to distribution fuse cutouts—excluding price control on power fuses, and clearance under additional Line and Southern patents was provided for by means of a "non-assertion" clause, without price control (R. 341-3).

This routine action of a General Electric patent attorney in submitting a revision of the agreement originally offered to General Electric by Southern is viewed with great suspicion by the Government. Its Supplemental Brief states that the redraft, "whose Paragraph 10 provided for price

control, was drafted by Bobst, General Electric's patent counsel" (p. 13) and conveniently ignores the fact that the agreement originally submitted by Southern provided for price control on all devices covered by any of the many patents in the license, whereas the effect of Bobst's redraft was to curtail the scope of price control. Since the patent owners had by this time made it abundantly clear that without at least some price control no license at all would be granted, the obvious thing to do seemed to be to submit a counter-offer providing for as little price control as possible.

How else does the Government suppose that the limitations on price control which General Electric and the other licensees eventually were successful in getting could come about? The licensor was not interested in limiting price control; if the infringers were to reduce price control, they had to take the initiative and make some concrete suggestions in the light of what was possible to be obtained.

As Bobst testified, at this meeting General Electric did not agree to any course of action (R. 343). The infringers were exchanging views as to the possibility of invalidating the patents and objections to the license agreement proposed to each of them by Southern; but in the final analysis it was up to each of the infringers to reach its own decision as to taking a license upon the best terms it could get from the patent owners. As the evidence shows, General Electric proceeded with its own negotiations and eventually signed licenses regardless of what others might subsequently do (R. 352-3).

On August 21, 1939, Bobst submitted to Line a draft of license, stating:

> "The royalty rate is that which you proposed at our recent meeting in New York. We feel that in

addition to the limit of $100,000 for all licensees,[1] there should be also a limit for General Electric which represents its fair proportion of the $100,000 as *we have no assurance that there will be 'other licensees' under the patents.*

"Price control is limited to 'distribution dropout fuse cutouts'. We feel very strongly that this limitation should be included * * *" (Ex. GE-41, R. 1976).

Having become convinced that there was no possibility of obtaining a license under the two important patents without yielding to the patent owners' insistence that such a license must provide for price control by the licensor, *General Electric's efforts were now centered on limiting the price control provisions as much as possible* (Exs. GE-43-4, R. 1979-80) by limiting price control only to devices covered by the two important double jointed hinge dropout patents and by providing that only distribution fuse cutouts would be subject to price control.

However, this latter limitation was not satisfactory to Line, and new drafts were drawn up by Brown, Line's patent attorney. Considerable correspondence and negotiation ensued, *General Electric always trying to limit the price control as much as possible* (Exs. GE-45-8, R. 1981-7; Ex. 61, R. 727).

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[1]This refers to a proposed provision of the license, which subsequently was included (Ex. 94, at R. 820), that the royalty payment should be on a sliding scale based on the total amount of royalties which the licensor received from all licensees under the patents. This royalty provision, in addition to the other facts set forth *supra*, pp. 18-9, clearly made necessary the provision of the licenses providing for the inspection by the licensees of the licensor's books, a provision of which the Government complains.

Up to this time General Electric had not made any final decision as to whether or not it would take a license from Line. All of the discussions by General Electric were merely exploratory. Neither Bobst nor Wagner had any authority to commit General Electric (R. 336), and even they had not definitely made up their own minds. In Bobst's letter to Wagner dated November 8, 1939 (Ex. GE-49, R. 1988), he states:

> "I think it should be decided definitely whether we want the license and at what royalty rate."

Also, General Electric was continuing its exhaustive searches to discover prior art (Exs. GE-51-4, R. 1990-7) and its engineers continued their attempts to try to avoid the patents so as to make a license unnecessary (R. 350). If any conspiracy to fix prices had existed, certainly those activities would have ceased at once.

In the meantime, the patent owners were pressing for General Electric's decision in the matter, with General Electric insisting that it needed time for further consideration (Exs. GE-55-6, R. 1997-8).

After further conferences as to the form of the proposed agreements (R. 350), on January 17, 1940, Line Material sent General Electric revised agreements and asked that they "be executed as soon as possible" (Ex. 87, R. 809).

It was apparent at that time that General Electric had to make up its mind.

Therefore, Mr. Tullar, Vice President in charge of the General Electric Patent Department, wrote Mr. Philip Reed, Chairman of the Board, outlining the situation which made it necessary to take the license, stating that

"As to the two recently issued patents [the Lemmon and Schultz patents], however, *we frankly do not have a leg to stand on*"

and asking for the approval of the Board (Ex. GE-60, R. 2003, 2004). The approval having been given, the agreements (Exs. 94-5, R. 819-51) were executed by General Electric on April 9, 1940, effective as of March 15, 1940.

The fact that, as the Government stresses, Line concentrated its most intensive efforts on General Electric in its campaign to enforce commercial recognition of its patents, thinking that others would probably be influenced if General Electric took a license, is without sinister significance. (Indeed, the fact that Line was willing to and did concentrate its efforts, including a suit in Milwaukee on the Kyle patent (FF 17, R. 508), against the most powerful infringer, shows the strength of Line's determination and its patent position). General Electric was forced by Line to pay a price which Line legally had the right to exact. The fact that General Electric could reasonably expect that the other infringers, in a similar hopeless position, would be forced to pay the same price, or that as a practical matter General Electric's capitulation might hasten or aid that result, certainly does not make General Electric's conduct illegal. These facts certainly did not compel it to allow itself to be sued out of business in the patented cutouts in order to avoid being charged with illegal conduct.

Even after the execution of these licenses, General Electric continued to try to design satisfactory dropout fuse cutouts which would not infringe the licensed patents and would thus not be subject to price control by Line (Exs. GE-63-8, R. 2007-19, R. 356).

Development authorizations not only for 1939 but for the years 1940 and 1941, which were after the signing of the license, show the appropriation of money for research to develop a dropout cutout *"which avoids the present patent and license situation"* (Exs. GE-66-8, R. 2011-19). Similar development appropriations to avoid the licensed patents were made in succeeding years (R. 356).

The result of imposing price control on General Electric was an interesting one. After taking the license General Electric placed partciular emphasis on the sale of the non-dropout cutout, which is not price controlled. As a result of this emphasis in sales effort, General Electric's business has tended to shift to the non-price controlled item, the non-dropout cutout. While the sale of dropouts constituted 62% of the total cutout business in 1939 and 62.3% in 1940, yet in 1941 the General Electric sales of price controlled dropouts started to decline to 60.2% as a result of its emphasis on the non-patented items, and in 1942 it went to 56.4%, in 1943 to 53.6%, and in 1944 to 53% (R. 357).

Thus General Electric not only opposed price control, and tried to avoid it, but after General Electric found it had to take a license and could not avoid price control, it particularly promoted those devices not subject to price control.

All of these facts show conclusively that General Electric took its license in good faith, that price control was imposed by the patent owners, and that the Government's picture of General Electric as the instigator of a price control scheme is without any foundation.

**D. The District Court properly found that there was no fixing of resale prices by any of the appellees.**

The District Court found that there was no fixing of resale prices on licensed dropout cutouts by appellees or any of them (FF 31, R. 513). The Government now, on the second argument of this case, attempts to challenge this finding (Govt. Supp. Brief, pp. 97-102), despite the fact that resale price maintenance was not charged in the Complaint (R. 4) and is wholly outside the issue of conspiracy framed in the District Court's Pre-trial Order (R. 77), and the abandonment of the point by the Government *sub silentio* on the first argument.

None of the licenses issued by Line contained any provision with respect to resale prices, nor did any of the schedules attached to, or issued in connection with, the licenses purport to set prices for any other than initial sales by the licensees. Kyle and Lemmon both testified that neither Line nor Southern controlled resale prices (R. 130, 285).

The only evidence relied upon by the Government (Govt. Supp. Brief, pp. 97-102) to refute the Court's finding that none of the appellees fixed resale prices involves a complaint by Line to Matthews with respect to prices quoted by two jobbers of Matthews, an attempt by Line in 1943 to get Kearney to secure information with respect to a certain transaction by one of Kearney's jobbers, and complaints by Line to Westinghouse with respect to the prices charged by certain of Westinghouse's agents, *viz*, Roden, Wesco and Nichols.

With respect to the Matthews matter, as the Government concedes, the complaint of Line was rebuffed by Matthews on the advice of counsel that it could not legally

control its jobbers' selling prices (Ex. 415, R. 1586). Kline testified that, on advice of counsel, the rebuff was accepted and the matter dropped (R. 285).

With respect to the Kearney matter, although the request of Line was for information only, it too, as the Government concedes, was rebuffed by Kearney (Ex. 485, R. 1665).

With respect to the Westinghouse matter, involving transactions by Roden, Wesco and Nichols, Stratton, of Westinghouse, testified that these companies were not independent contractors but were agents of Westinghouse (R. 466-7), and Line knew that many of Westinghouse's distributors were agents (*e.g.*, Ex. 476, R. 1657).[1] Therefore, what was involved were initial sales prices quoted by Westinghouse through its agents, and not resale prices.

Moreover, the Government loses sight of the fact that the charge in this case is a conspiracy among all the appellees to fix their prices for dropout fuse cutouts. Even if a couple of minor aberrational *attempts* over the years on the part of a couple of the appellees had been proved, it would hardly prove a general or continuing conspiracy. The very paucity of the evidence as to any resale price maintenance would demonstrate the contrary.

The Government's evidence at most, therefore, comes down to a complaint with respect to a couple of transactions and an attempt to get information, neither of which was carried through, and to the entirely legal fixing of minimum initial sales prices. Therefore, when the District Court

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[1]The Government's attack on the sufficiency of this testimony to establish the fact of agency comes with poor grace at this time in view of the fact that the testimony went in without objection, cross examination or other attempt at the time of trial to test the underlying facts on which it was based.

found resale prices were not in fact fixed, it was plainly right.

**E. Line is a manufacturing patentee and as such has a direct interest in the prices at which its licensees sell.**

While Line is, as we will show, a manufacturing patentee, preliminarily we suggest that in any event it is not, contrary to the Government's contention (Govt. Supp. Brief, pp. 127-9), unlawful *per se* for a non-manufacturing patentee to fix the price at which the licensee sells the licensed products.

While the language of the *General Electric* case, sustaining the legality of price-fixing by a patentee, is phrased in terms of protecting the patentee's own manufacturing profit,[1] this was obviously because it was addressed to the case then under consideration, and not some other case. But it will be noted that the discussion was commenced with the words

> "*One* of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory [Italics supplied]."[2]

Obviously another valuable element, and often equally important, is the right of a patentee to acquire royalty income, and when the royalty is based on a percentage of the sales price, as in the present case, the higher the price, the greater the royalty income, unless the price is prohibitory. Indeed, this fact and the legitimate use of price limitations to en-

[1] 272 U. S. at p. 490.
[2] 272 U. S. at p. 490.

hance the patentee's profit through royalties was recognized in the *Ethyl* case cited by the Government. In distinguishing the *Ethyl* case from the type of situation here involved, this Court said:

> "Appellant neither owns nor sells the patented fuel nor derives any profit through royalties or otherwise from its sale".[1]

We believe, therefore, that the Second Circuit Court of Appeals was plainly right in holding that a non-manufacturing patentee may fix the prices at which his licensee sells the licensed product.[2]

However, this question is not really presented in this case, because Line, as found by the Trial Court, does itself regularly manufacture and sell, or is ready to manufacture and sell on special order, all the patented devices on which it establishes minimum prices (FF 33, R. 514), a fact which is not controverted by the Government. The Government appears to argue, however, that Line can, at most, lawfully fix prices with respect only to those devices *which are in the precise form* as those which it *regularly* manufactures and sells. This is indeed an attempt to distinguish, without substance in law or policy.

The detailed facts are these: Line fixed prices only on devices which it sold or was prepared to sell (R. 131, 360-1).[3] With respect to those devices which Line did not

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[1] 309 U. S. at 459.

[2] *Straight Side Basket Corporation* v. *Webster Basket Co., Inc.*, 82 F. (2d) 245 (C. C. A. 2nd, 1936).

[3] With respect to devices which Line did not sell or was not prepared to sell, it did not attempt to control prices, even though such devices came under the licenses and royalties were paid on them (R. 360).

regularly sell, but offered for sale on special order, it was ready, willing and able to fill orders (R. 360-1); although Line might not have had them in stock, it had them "in design or in process of design" (R. 288-9). The prices set for the latter devices were those at which Line had arrived after cost and other studies, and at which it was prepared to sell (R. 289).

We suggest that, even if the doctrine of the *General Electric* case were to be construed as requiring the price-fixing patentee himself to manufacture the patented devices, and even if Line did not manufacture, or offer for sale, *all* the detailed variations of the licensed device, Line would still be a manufacturing patentee having sufficient financial interest in the prices at which its licensees sell to fix prices lawfully on all constructions of the licensed device sold by its licensees. The patented devices all serve the same function and are all in competition with each other to a greater or lesser degree. They were, according to the unimpeached testimony of qualified witnesses, "comparable" (R. 130-1, 249, 254, 457). Therefore, the relation of the prices of the devices which Line actually sold to the prices for other constructions sold by the licensees must have determined which one a customer bought. How, then, is it possible to say, as the Government must say to hope to prevail, that the licensees' prices would not

> "necessarily affect the price at which he [the patentee] can sell his own patented goods".[1]

We would suppose some such reasoning must have influenced this Court in the *Bement*[2] case, in which no

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[1] *United States* v. *General Electric Company, et al.*, 272 U. S. 476, 490 (1926).

[2] *Bement* v. *National Harrow Company*, 186 U. S. 70 (1902).

qualification was laid down that the licensing patentee could lawfully fix prices only on the precise constructions of the licensed device which he himself manufactured and sold. In fact, it nowhere appears that the patentee in that case even manufactured or sold any of the licensed devices.

In any event, however, in the present case Line was, as we have pointed out above, ready, able and willing to sell every construction of the licensed device as to which it fixed prices and actually had them in design or in process of design.

Under the circumstances of this case, therefore, there seems no room to doubt that the licensees' prices would "necessarily affect the price at which" Line could sell its "own patented goods" and that in setting minimum prices for such devices Line was "protecting its rights as a patentee," not only in respect of its royalties on those patented devices, and in respect of its opportunities to get orders for those devices, but in respect of its sales of the particular constructions of the devices which it was in fact selling. Line was a manufacturing patentee, and, in limiting the prices of its licensees, its action was entirely within even a limited interpretation of the *General Electric* case.

## CONCLUSION

For the reasons stated above and in our Main Brief, the judgment of the District Court should be affirmed.

Respectfully submitted,

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November 5, 1947.

## APPENDIX

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